Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO: 88-6025

In the Supreme Court of the United States

OCTOBER TERM, 1988

REUBEN DOWLING, PETITIONER

v.

UNITED STATES OF AMERICA,
AND GOVERNMENT OF THE VIRGIN ISLANDS,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner

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TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF INTEREST OF THE AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT I

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED WHEN EVIDENCE OF PETITIONER'S PRIOR ACQUITTED CONDUCT WAS INTRODUCED IN HIS SUBSEQUENT ROBBERY TRIAL.....6

A. The Fifth Amendment Double Jeopardy Clause Has Been The Subject of Generally Expanding Interpretation Since The Founding Of The United States.....8

B. The Complexity Of Modern Litigation And The Increasing Workload Of American Courts Has Resulted In Expansion Of The Doctrine Of Collateral Estoppel.....16

C. Ashe v. Swenson.....18

D. The Constitutional Doctrine Of Collateral Estoppel Established in Ashe Should Be Applied Whenever The Government Seeks To Introduce

Evidence Of Prior Acquitted Conduct in Subsequent Criminal Trials.....22

E. The Burden Of Proof For Introduction Of Evidence Under Rule 404(b) Does Not Mandate A Different Result.....39

ARGUMENT II

THE THIRD CIRCUIT ERRONEOUSLY FAILED TO APPLY THE CONSTITUTIONAL HARMLESS ERROR STANDARD SET FORTH IN CHAPMAN v. CALIFORNIA.....43

CONCLUSION.....45

TABLE OF AUTHORITIES

Cases:

Albert v. Montgomery, 732 F.2d 865 (11th Cir. 1984).....24, 30

Ashe v. Swenson, 397 U.S. 436 (1970).....3, passim

Bartkus v. Illinois, 359 U.S. 121 (1959) (Black, J. dissenting).....10

Benton v. Maryland, 395 U.S. 784 (1969).....18

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971).....17

Chapman v. California, 386 U.S. 18 (1987).....8, 43, 44

Collins v. Loisel, 262 U.S. 426 (1923).....15

DeLaRosa v. Lynaugh, 817 F.2d 259 (5th Cir. 1987).....24

Downum v. United States, 372 U.S. 734 (1963).....13

Ex Parte Lange, 85 U.S. (18 Wall) 163 (1873).....10, 13

Flittie v. Solem, 775 F.2d 933 (8th Cir. 1985).....26

Frank v. Mangum, 237 U.S. 309 (1915).....15

Green v. United States,
355 U.S. 184 (1957).....11, 12

Helvering v. Mitchell,
303 U.S. 391 (1938).....31

Hoag v. State of New Jersey,
356 U.S. 464 (1958).....19

Holt v. United States, 404
F.2d 914 (10th Cir. 1968), cert.
denied, 393 U.S. 1086 (1969).....27

Huddleston v. United States,
__ U.S. __, 108 S.Ct. 1496
(1988).....39, 40, 42

Lockhart v. Nelson,
__ U.S. __, 109 S.Ct.
289 (1988).....12

Michelson v. United States,
335 U.S. 469 (1948).....33, 37

Montana v. United States,
440 U.S. 147 (1979).....17

Oliphante v. Koehler, 594
F.2d 547 (6th Cir. 1979).....25

One Lot Emerald Cut Stones v.
v. United States, 409 U.S. 232
(1979).....23, 31

Palko v. Connecticut,
302 U.S. 319 (1937).....18

Parklane Hosiery Co. v.
Shore, 439 U.S. 322 (1979).....17

Rice v. Marshall,
816 F.2d 1126 (6th Cir. 1987).....24, 25

Sealfon v. United States,
332 U.S. 575 (1948).....15, 16

Standefer v. United States,
447 U.S. 10 (1980).....23

United States v. Adams,
281 U.S. 202 (1930).....15

United States v. Ball,
163 U.S. 662 (1896).....12

United States v. Brown,
547 F.2d 438, 443 (8th Cir.),
cert. denied, 430 U.S. 937
(1977).....26

United States v. Castro, 629
F.2d 456 (7th Cir. 1980).....26

United States v. Castro-Castro,
464 F.2d 336 (9th Cir. 1972),
cert. denied, 410 U.S. 916
(1973).....26, 27

United States v. Day,
591 F.2d 861 (D.C. Cir. 1978).....30

United States v. Dowling,
855 F.2d 114, 122-4
(3rd Cir. 1988).....25, 38
43, 44

United States v. Gentile,
816 F.2d 1157 (7th Cir. 1987).....26

United States v. Gonzalez-Sanchez,
825 F.2d 572 (1st Cir.), cert.
denied, __ U.S. __, 108 S.Ct.
510 (1987).....24, 30, 44

United States v. Gornto,

792 F.2d 1028 (11th Cir. 1986).....24

United States v. Jackson,
778 F.2d 933 (2d Cir. 1985),
cert. denied, 479 U.S. 910
(1986).....24

United States v. Johnson,
697 F.2d 735, (6th Cir.
1983).....24, 25

United States v. Keller, 624
F.2d 1154 (3rd Cir. 1980).....24

United States v. Kimberlin,
805 F.2d 210 (7th Cir. 1986),
cert. denied, __ U.S. __, 107
S.Ct. 3270 (1987).....26

United States v. Kramer, 289
F.2d 909 (2d Cir. 1961).....24, 29, 40

United States v. Lee, 622
F.2d 787, reh. denied, 633
F.2d 582 (5th Cir. 1980),
cert. denied, 451 U.S. 913
(1981).....35

United States v. Mespoulede,
597 F.2d 329 (2d Cir. 1979).....24, 31, 32

United States v. Mock,
604 F.2d 341 (5th Cir. 1979).....24, 30

United States v. Mulherin, 710
F.2d 731 (11th Cir. 1983), cert.
denied, 465 U.S. 1034 (1984).....24, 25

United States v. Oppenheimer,
242 U.S. 85 (1916).....14, 15

United States v. One Assortment

of 89 Firearms, 465 U.S. 354 (1984).....23, 31

United States v. Riley, 684 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983).....26

United States v. Rocha, 553 F.2d 615 (9th Cir. 1977).....26

United States v. Savaiano, 843 F.2d 1280, (10th Cir.), cert. denied, __ U.S. __, 109 S.Ct. 99 (1988).....35

United States v. Van Cleave, 599 F.2d 954 10th Cir. (1979).....27

Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972).....24, 27, 28

Constitutional Provisions:

U.S. Const. Amend. V.....21, passim

U.S. Const. Amend XIV.....20

Statutes and Rules:

Supreme Court Rule 36.2.....2

Fed.R.Crim.Proc. 7(f).....36

Fed.R.Evid. 403.....42

Fed.R.Evid. 404(b).....4, passim

18 U.S.C. §§1951 et. seq.....36

21 U.S.C. §846.....35

Articles and Treatises:

W. Blackstone, Commentaries on the Laws of England, [Lewis ed. 1902].....10

R. Knowlton, "Criminal Law and Procedure," 11 Rutgers L.Rev. 94 (1957).....34

D. Magers and F. Yarborough, "Bis Vexari," 74 Harv.L.Rev. 1 (1960).....34

W. McLaren, "the Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," 10 Wash. L.Rev. 198 (1935).....16

Note, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee," 65 Yale L.J. 339 (1956).....13

Note, "The Double Jeopardy Clause As A Bar to Reintroducing Evidence," 89 Yale L.J. 962 (1980).....12

J. Sigler, Double Jeopardy (1969).....10

S. Schulhofer, "Jeopardy and Mistrials," 125 U. of Penn.L. Rev. 449 (1977).....10, 13

Sutherland, Statutory Construction [4th ed.].....41

A. Vestal, "Issue Preclusion and Criminal Prosecutions," 65 Iowa

L. Rev. 281 (1980).....17

J.H. Wigmore, Treatise on the Anglo-American System of Evidence, [2d. ed. 1923] 32, 33, 37

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers throughout the 50 states. The NACDL was founded over 25 years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of criminal defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. A cornerstone

of this organization's objectives, and of the criminal justice system, is the Fifth Amendment prohibition against double jeopardy. The NACDL is very concerned about any decision which would undermine or restrict the scope of this constitutional guarantee, as would the adoption of the position taken by the respondents and the court below in the instant case.

The Amicus Curiae Committee of the NACDL has determined that the issues involved in this case are of such importance to criminal defense lawyers and their clients throughout the nation that the NACDL should offer its assistance to this Court. Without necessarily endorsing our positions, all parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Hon. William C. Bryson, Acting Solicitor

General of the United States, on behalf of respondents and Robert L. Tucker, Esq., Federal Public Defender for the District of the Virgin Islands, on behalf of petitioner. Letters of consent are on file with the Clerk of this Court.

SUMMARY OF ARGUMENT

The admission of evidence showing that a defendant has committed a crime of which he has been previously been acquitted violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

In Ashe v. Swenson, 397 U.S. 436 (1970), this Court first held that collateral estoppel in criminal cases was a constitutionally based doctrine rooted in the double jeopardy provisions of the Fifth Amendment. Ashe dealt with a situation in which a defendant was reindicted for a separate offense arising

out of the same factual situation which had resulted in the earlier charge of which he had been acquitted. However, the theory of Ashe is equally applicable where the government seeks to introduce evidence of prior acquitted conduct under Rule 404(b) of the Federal Rules of Evidence, other crimes evidence arising from a different factual setting from that of the offense being tried. In both situations, the defendant is being called upon to defend anew misconduct of which he has previously been put in jeopardy and acquitted. In both, he runs the risk that an adverse determination with respect to the acquitted conduct will result in his incarceration. And, in both, the government seeks an opportunity to relitigate issues which it has previously lost.

A review of the historical context in

which Ashe was decided shows that its principles should not be restricted in application. The development of double jeopardy and collateral estoppel jurisprudence since the beginning of the American republic has generally been one of expansion. Double jeopardy protection has been greatly expanded by this Court to maintain a balance between the resources of the government and defendants in the face of ever more complex prosecutions and greater prosecutorial discretion with respect to the framing of charges. Collateral estoppel has also, though more recently, been the subject of expansive development in response to the ever increasing work load of the courts and the consequent necessity of avoiding the relitigation of issues. The application of the principles of Ashe to cover situations such as that presented in the

instant case is logical and appropriate in this context.

The NACDL, whose members stand on the front lines of criminal defense, believes strongly that the Double Jeopardy Clause should be construed in the widest possible manner, particularly in the area of collateral estoppel. Where a defendant has been acquitted of a crime, the repose afforded by double jeopardy and collateral estoppel doctrines is one of the few protections the defendant has against excessive and, in some cases, even vindictive, reprosecution. In order to maintain the balance of power between the criminal defendant and the prosecutor which the framers of the Constitution understood to be essential, it is necessary, as prosecutorial power grows through the prol[illegible]eration of statutory offenses, to preserve the Double Jeopardy

Clause and collateral estoppel doctrine and to apply them in all situations in which they legitimately arise.

It is fundamentally unfair to expose a criminal defendant to charges of which he has been acquitted. Lacking resources comparable to those of the government, such a defendant is always handicapped when he must face the charges a second time. At the same time, allowing the government to relitigate issues it has lost demeans the value of a jury verdict and creates an incentive to wasteful and oppressive prosecutions.

The Third Circuit in the instant case undermined both the Double Jeopardy Clause and the constitutional doctrine of collateral estoppel enunciated in Ashe by holding that the erroneous admission of evidence of prior acquitted conduct under Rule 404(b) was not error of

constitutional magnitude. In applying a nonconstitutional harmless error standard instead of the "harmless beyond a reasonable doubt" standard enunciated in Chapman v. California, 386 U.S. 18 (1987), the Third Circuit undermined important constitutional protections which this Court should restore.

ARGUMENT

I

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED WHEN EVIDENCE OF PETITIONER'S PRIOR ACQUITTED CONDUCT WAS INTRODUCED IN HIS SUBSEQUENT ROBBERY TRIAL

A. The Fifth Amendment Double Jeopardy Clause Has Been The Subject Of Generally Expanding Interpretation Since The Founding Of The United States

Although Ashe v. Swenson was a seminal decision in which this Court first held that collateral estoppel was a constitutionally based doctrine rooted in the Double Jeopardy Clause, it arose in

the context of generally expanding interpretations of the Double Jeopardy Clause and the collateral estoppel doctrine by American courts, since the founding of the Nation. A brief review of this history demonstrates that the principles of Ashe were developed as an appropriate, if not inevitable, response to the increasing complexity of modern criminal litigation and should not be limited in their application to the literal facts of Ashe itself.

The drafters of the United States Constitution provided in the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The principle, however, that a defendant could not be tried twice for the same criminal offense was not a new one at the time of the adoption of the Bill of Rights. Indeed,

it has been traced back to Greek, Roman and Canon law. See generally, J. Sigler, Double Jeopardy (1969), pp. 1-37; S. Schulhofer, "Jeopardy and Mistrials", 125 U. of Penn. L.Rev. 449, 452 (1977) ("Schulhofer"); Bartkus v. Illinois, 359 U.S. 121, 151-2 (1959) (Black, J. dissenting); Ex Parte Lange, 85 U.S. (18 Wall) 163, 166-173 (1873). Blackstone recognized the principle as a ". . . universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once for the same offence." W. Blackstone, Commentaries on the Laws of England, Vol. 4, pp. 335-6 [Lewis ed. 1902].

At common law, the principle of double jeopardy was an extremely narrow and surprisingly harsh one. For example, a convicted person could not obtain a new trial through an appeal, since his success

on appeal would require that he submit to a second trial on the same offense. Green v. United States, 355 U.S. 184 (1957). Nevertheless, the framers of the Constitution believed that the principle was so critical to the administration of justice that it needed to be included in the Bill of Rights.

> "The need for the principle's general protection was undisputed, though its scope was not clearly defined. Fear of the power of the newly established Federal Government required 'an explicit avowal in [the Constitution] * * * of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law.' People v. Goodwin, 18 Johns., N.Y., 187, 202."

Id. at 201 (Frankfurter, J. dissenting).

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources

> and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 187-8. See also Note, "The Double Jeopardy Clause as a Bar to Reintroducing Evidence," 89 Yale L.J. 962, 963-4 (1980).

After the adoption of the Constitution, American jurisprudence began to define and expand on the protections provided by the Double Jeopardy Clause. For example, the courts repudiated the early common law view that a defendant could not obtain a new trial after a successful appeal. United States v. Ball, 163 U.S. 662 (1896); Lockhart v. Nelson, __ U.S. __, 109 S.Ct. 289 (1988); Green v. United States, supra, 202-204. Despite the "life

or limb" language of the Fifth Amendment, it was held to cover all crimes, Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873). Jeopardy, once thought to attach only after a verdict was rendered, was held to attach as soon as a judge began to hear evidence, Downum v. United States, 372 U.S. 734 (1963). See generally Schulhofer 452-457.

In the nineteenth century, the issue of double jeopardy came up in relatively simple contexts. The prevailing theory of prosecution, apparently going back as far as the middle ages, was to charge an entire criminal transaction in a single count. See generally Note, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee," 65 Yale L.J. 339, 341-2 (1956). Accordingly, it was generally a straight forward task to determine whether

an individual had been prosecuted for the same offense previously. Later in the nineteenth century, however, prosecutors began to split charges into separate counts in which a single transaction might generate a number of different charges. In this context, the acquittal of a defendant on some charges and his retrial on other charges began to present questions of double jeopardy in more complex settings. It is at this point that the doctrines of res judicata and collateral estoppel find increasing expression in the criminal jurisprudence of this Court.

In United States v. Oppenheimer, 242 U.S. 85 (1916), Mr. Justice Holmes seemed comfortable with the notion that collateral estoppel applied in criminal cases even where reprosecution was not absolutely barred.

> "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." Id. at 87.

In Frank v. Mangum, 237 U.S. 309 (1915), the Court stated:

> "* * * a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction." Id. at 334.

Mr. Justice Brandeis referred to the concept of res judicata as a "fundamental principle" of criminal cases in Collins v. Loisel, 262 U.S. 426, 430 (1923). Again, in United States v. Adams, 281 U.S. 202 (1930), the Court noted that a criminal judgment was "conclusive on all that it decided." Id. at 205. And, in Sealfon v.

United States, 332 U.S. 575, 578 (1948), the Court held that the doctrine of collateral estoppel "operates to conclude those matters in issue which the verdict determined though the offenses be different." For an early discussion of these cases, see W. McLaren, "the Doctrine of Res Judicata as Applied to the Trial of Criminal Cases," 10 Wash. L. Rev. 198 (1935).

B. The Complexity Of Modern Litigation And The Increasing Workload Of American Courts Has Resulted In Dramatic Expansion Of The Doctrine Of Collateral Estoppel

Along with the increasing interest in the application of the doctrines of res judicata and collateral estoppel in criminal cases, there was a dramatic expansion of those principles in civil litigation.

As has been demonstrated by Professor Vestal, the Ashe decision came down at

exactly the point when this Court and other courts in the United States were placing increasing reliance on principles of res judicata and collateral estoppel as a way of reducing the amount of civil litigation in the courts. A. Vestal, "Issue Preclusion and Criminal Prosecutions," 65 Iowa L. Rev. 281, 285-7 (1980). For example, this Court eliminated the old doctrine of mutuality of estoppel, requiring both plaintiff and defendant to have been bound by a previous judgment in order for collateral estoppel to apply. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). In Montana v. United States, 440 U.S. 147 (1979), the Court used the doctrines of collateral estoppel and res judicata against the United States even though it was not a

party in a previous lawsuit because of its active role as a "participating nonparty" in such action.

Thus, the "marriage" of double jeopardy and collateral estoppel in Ashe was an almost inevitable consequence of the expansion of both doctrines in response to the development of complex modern litigation in which the opportunity for, and danger of, relitigation of crimes was far greater than was known in the 18th and 19th centuries.

C. Ashe v. Swenson

Overruling its prior decision in Palko v. Connecticut, 302 U.S. 319 (1937), this Court first held that the Double Jeopardy Clause was a fundamental constitutional right binding on the states in Benton v. Maryland, 395 U.S. 784 (1969). A year later, in Ashe v. Swenson, 397 U.S. 436 (1970), the Court focused on the

constitutional implications of the doctrine of collateral estoppel, its relationship to double jeopardy and the method by which courts ought to apply the doctrine of collateral estoppel in the context of successive criminal prosecutions. These issues had been previously avoided in Hoag v. State of New Jersey, 356 U.S. 464 (1958), a case factually almost indistinguishable from Ashe.

The facts of Ashe are instructive. In Ashe, a habeas corpus proceeding, the defendant sought to overturn his conviction for robbery. The evidence in his first trial had shcwn that three or four armed men robbed six poker players in the home of one of the victims. The defendant was charged in separate counts with robbery of each of the six poker players; however, he was initially tried

on only one count. The jury returned a verdict of acquittal, evidently finding that the identification of the defendant was unreliable. The state then proceeded to prosecute the defendant for having robbed a second poker player. This time, the witnesses, having had their recollections refreshed, were substantially more positive of the identification of the defendant. He was convicted.

In Ashe, the Court held that the conviction violated the Double Jeopardy Clause of the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, because the state had procured the conviction by relitigating the basic facts of the robbery on which it had originally lost.

> "The ultimate question to be determined, then, in the light of Benton v. Maryland, supra, is whether this

> established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, North Carolina v. Pearce, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time. Green v. United States, 355 U.S. 184, 190." Id. at 445.

The Court elaborated on the manner in which the collateral estoppel doctrine should be applied:

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational

jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' Sealfon v. United States, 332 U.S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." Id. at 443-4.

D. The Constitutional Doctrine Of Collateral Estoppel Established in Ashe Should Be Applied Whenever The Government Seeks To Introduce Evidence Of Prior Acquitted Conduct In Subsequent Criminal Trials

In the aftermath of Ashe, this Court has not addressed the issue of whether the principles of Ashe can be applied to preclude the introduction of evidence of acquitted conduct in prosecutions which arise from different factual scenarios.

The Court has determined that a criminal acquittal does not collaterally estop the government from litigating the same issues in a civil case, One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984). And, the Court has determined that Ashe does not prohibit the conviction of an individual for aiding and abetting even though the principal has been acquitted, Standefer v. United States, 447 U.S. 10 (1980). But, it has not dealt with the issue raised in this case of whether evidence of prior acquitted conduct can be constitutionally introduced as Rule 404(b) evidence in a subsequent criminal case involving unrelated charges.

Most of the Circuits have taken the position that a prior acquittal can foreclose the government in one way or

another from introducing evidence of facts that were determined in the previous trial. United States v. Gonzalez-Sanchez, 825 F.2d 572, 584 (1st Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 510 (1987); United States v. Jackson, 778 F.2d 933 (2d Cir. 1985), cert. denied, 479 U.S. 910 (1986); United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. Keller, 624 F.2d 1154 (3rd Cir. 1980); DeLaRosa v. Lynaugh, 817 F.2d 259 (5th Cir. 1987); United States v. Mock, 604 F.2d 341 (5th Cir. 1979); Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972); Rice v. Marshall, 816 F.2d 1126 (6th Cir. 1987); United States v. Johnson, 697 F.2d 735 (6th Cir. 1983); United States v. Gornto, 792 F.2d 1028 (11th Cir. 1986); Albert v Montgomery, 732 F.2d 865 (11th Cir. 1984); United States

v. Mulherin, 710 F.2d 731 (11th Cir. 1983), cert. denied, 465 U.S. 1034 (1984); United States v. Day, 591 F.2d 861 (D.C. Cir. 1978).

Of these Circuits, the First, Second, Fifth, Eleventh and the D.C. Circuits take the position that double jeopardy clause precludes the introduction of such evidence. The Third Circuit and the Sixth Circuit have not adopted the view that collateral estoppel, as applied to subsequent unrelated prosecutions, is a constitutional doctrine. In this sense, they have limited Ashe to its general fact pattern. United States v. Dowling, 855 F.2d 114, 122-4 (3rd Cir. 1988); United States v. Johnson, supra; but see Rice v. Marshall, supra; see also Oliphante v. Koehler, 594 F.2d 547 (6th Cir. 1979).

While acknowledging the principles of Ashe, the Seventh and Eighth Circuits have

severely, and we believe unfairly, limited their application United States v. Gentile, 816 F.2d 1157 (7th Cir. 1987); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986), cert. denied, __ U.S. __, 107 S.Ct. 3270 (1987); Flittie v. Solem, 775 F.2d 933 (8th Cir. 1985); but see United States v. Castro, 629 F.2d 456, 465 (7th Cir. 1980); United States v. Brown, 547 F.2d 438, 443 (8th Cir.), cert. denied, 430 U.S. 937 (1977).

Finally, cases in the Eighth, Ninth and Tenth Circuits have taken the position that a prior acquittal is simply no bar to the introduction of evidence of acquitted conduct in a subsequent criminal trial, United States v. Riley, 684 F.2d 542 (8th Cir. 1982), cert. denied, 459 U.S. 1111 (1983); United States v. Rocha, 553 F.2d 615 (9th Cir. 1977); United States v. Castro-Castro, 464 F.2d 336 (9th Cir.

1972), cert. denied, 410 U.S. 916 (1973); United States v. Van Cleave, 599 F.2d 954 10th Cir. (1979); Holt v. United States, 404 F.2d 914 (10th Cir. 1968), cert. denied, 393 U.S. 1086 (1969). However, these latter opinions do not really discuss the double jeopardy issue and cannot be seen as very persuasive authority.

Leading cases in the Second and Fifth Circuits have addressed the issue of whether collateral estoppel can be applied in cases, such as the instant case, in which evidence of prior acquitted conduct is introduced in subsequent and substantially unrelated prosecutions. These Circuits have applied it without hesitation:

The Fifth Circuit observed:

> "We do not perceive any meaningful difference in the quality of 'jeopardy' to which a defendant is again

> subjected when the state attempts to prove his guilt by relitigating a settled fact issue which depends upon whether the relitigated issue is one of 'ultimate' fact or merely an 'evidentiary' fact in the second prosecution. In both instances the state is attempting to prove the defendant guilty of an offense other than the one of which he was acquitted. In both instances the relitigated proof is offered to prove some element of the second offense. In both instances the defendant is forced to defend again against charges or factual allegations which he overcame in the earlier trial."

Wingate v. Wainwright, 464 F.2d 209, 213-14 (5th Cir. 1972).

The same court went on to conclude:

> "It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from

> the blight and suspicious aura which surround an accusation that he is guilty of a specific crime."

Id. at 215.

In a similar fashion, Judge Friendly in the Second Circuit had written even before Ashe:

> "A defendant who has satisfied one jury that he had no responsibility for a crime ought not be forced to convince another of this, even in a prosecution where in theory, although very likely not in fact, the Government need not have tendered the issue . . . The Government is free, within the limits set by the Fifth Amendment . . . to charge an acquitted defendant with other crimes claimed to arise from the same or related conduct; but it may not prove the new charge by asserting facts necessarily determined against it on the first trial, no matter how unreasonable the Government may consider that determination to be."

United States v. Kramer, 289 F.2d 909, 915-916 (2d Cir. 1961); accord, United

States v. Gonzalez-Sanchez, supra; United States v. Mock, supra; Albert v. Montgomery, supra; United States v. Day, supra.

Although Ashe dealt with a situation in which the defendant was accused in a second prosecution which grew out of the same core of facts that had previously resulted in an acquittal, there is nothing about the reasoning of Ashe and its emphasis on collateral estoppel as a doctrine grounded in the Double Jeopardy Clause that prevents its application to any situation in which a defendant has been acquitted of criminal charges and must relitigate the incident in a second criminal trial. Indeed, the strong policies underlying the Double Jeopardy Clause and the collateral estoppel doctrine, as they have evolved over time, favor this particular application of Ashe.

Where a defendant faces evidence of an extrinsic crime, the fact that he is on trial for a different offense arising from a different set of facts does not change the reality that he is being called upon to relitigate the first offense and his participation in that offense at the peril of his incarceration. He is forced to "run the gantlet" again in a criminal trial. In this connection, United States v. One Assortment of 89 Firearms, supra, One Lot Emerald Cut Stones v. United States, supra, and Helvering v. Mitchell, 303 U.S. 391 (1938) are distinguishable because they only dealt with the ability of the government to relitigate prior acquitted conduct in a subsequent civil case. Chief Judge Kaufman noted this critical distinction in United States v. Mespoulede, supra, at 335:

> "This is not a situation in which the second suit is

> civil in nature, where the defendant faces sanctions or penalties of quite a different order than those he escaped through acquittal on criminal charges. Here. . . [the defendant] is once again faced with criminal sanctions that, realistically, may be imposed in large part because the second jury is persuaded. . . [of the acquitted conduct]."

The contention that a defendant is not forced to face a criminal prosecution for the first offense when all that is done is to introduce evidence of his participation in the first offense as a method of assisting the trier of fact in deciding his involvement in a second offense is simply without merit. It ignores the reality, long recognized by American courts, that triers of fact tend to give evidence of extrinsic misconduct "excessive weight," and to punish such uncharged misconduct. J.H. Wigmore, Treatise on the Anglo-American System of

Evidence, [2d ed. 1923] ("Wigmore"), §194; Michelson v. United States, 335 U .S. 469, 475-6 (1948).

Allowing the government, in effect, to retry the defendant for conduct for which he has been previously acquitted by using evidence of the acquitted conduct in a second trial on unrelated charges upsets the balance of power struck by the Double Jeopardy Clause. It strongly favors the government at the expense of the defendant. The defendant and his counsel must cope with defending multiple offenses in multiple factual settings and frequently lack sufficient notice and resources to do so. Counsel to the unsuccessful petitioner in Hoag subsequently wrote about this drain on resources in even the more limited context of successive prosecutions arising out of a single criminal transaction:

> "A prosecutor, by carving up what is essentially one criminal transaction into a great number of offenses, may prosecute a person until the statute of limitations has run its course. This is true even though each trial may result in an acquittal and the only reason for the cumulative prosecutions is the prosecutor's subjective evaluation of the guilt of the individual. This possibility leaves the door open to vexatious litigation with its consequential nervous strain upon the mind and body of the individual as well as the inevitable drain upon his finances."

R. Knowlton, "Criminal Law and Procedure," 11 Rutgers L. Rev. 94 (1957); see also D. Magers and F. Yarborough, "Bis Vexari," 74 Harv.L.Rev. 1, 32 (1960).

The unfairness of permitting use of evidence of prior acquitted conduct is compounded by the fact that, although the proliferation of statutory offenses has widened prosecutorial discretion in selecting charges, relatively little

information is available to the accused in the federal criminal system about these charges prior to trial. Drug conspiracies, for example, do not require the specification or proof of an overt act; and, therefore, the indictments charging such crimes often provide little notice of an intention to utilize prior acts. 21 U.S.C. Sec. 846; United States v. Lee, 622 F.2d 787,790, reh. denied, 633 F. 2d 582 (5th Cir. 1980), cert. denied, 451 U.S. 913 (1981); United States v. Savaiano, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, __ U.S. __, 109 S. Ct. 99 (1988). And, the conspiracies themselves are often so lengthy and intricate that they may with little notice be construed at trial to encompass prior acquitted conduct. To a great extent, the same is true of RICO conspiracies, an increasingly popular weapon in the expanding statutory

arsenal of federal prosecutors. 18 U.S.C. §§1951 et seq.

Bills of particulars under Rule 7(f) of the Federal Rules of Criminal Procedure do not remedy these problems of notice. They are discretionary and, in our experience, disfavored by the District Courts.

In its brief on the question of whether the Court should grant a writ of certiorari in this case, the government states that "[e]vidence offered under Fed.R.Evid. 404(b) is often helpful to fact finders in criminal cases." (Br. Resp. 11). This argument, however, most respectfully, misses the point. Evidence of prior misconduct tends to be "helpful" because it tends to relieve the jury to some degree of responsibility for judging whether a defendant is guilty of the crime for which he is under indictment and for which he is being tried. As Professor

Wigmore put it:

> "It may almost be said that it is because of this indubitable Relevancy of such evidence that it is excluded. It is objectionable, not because it has no appreciable probative value, but because it has too much." Wigmore, §194.

Nor have American courts historically looked with favor on evidence of prior acts of misconduct. Unlike their continental counterparts, British and American courts have generally looked with disfavor on this evidence. Id.; Michelson v. United States, supra, at 475-6. Rule 404(b), it should be noted, is itself a general rule of exclusion rather than inclusion in this regard.

In the instant case, petitioner was acquitted of robbing Vena Henry. Subsequently, he was tried three times, on the present charges, the last trial resulting in the instant conviction.

Petitioner's ordeal was almost interminable; the result was virtually inevitable.

The evidence in the case does not appear to have been very strong. In the first of those three trials, the jury was hung, evidently unpersuaded by the identification evidence. As the Third Circuit explained, 855 F.2d 116-118, all three major identification witnesses were seriously impeached by prior failed identifications.

In this context, calling upon petitioner to defend once again his participation in the Vena Henry robbery in his last trial was necessarily a devastating blow to the defense of a close case. It gave the prosecution an unfair advantage against a beleaguered defendant who had been acquitted and against whom the evidence was not great. Petitioner had "run the

gantlet" on the Henry offense; his ordeal should have been concluded.

E. The Burden Of Proof For Introduction Of Evidence Under Rule 404 (b) Does Not Mandate A Different Result

The principal argument which tends to be made against applying the principles of Ashe to situations such as that presented in the instant case is that preclusive effect can only be given to facts which are determined on the same standard of proof. Thus, it is argued, that an acquittal in a prior criminal case only determines that the government failed to prove the case beyond a reasonable doubt. In contrast, evidence of acts of extrinsic misconduct can generally be introduced if the trial court ". . . examines all the evidence in the case and decides. . . [that] the jury could find the conditional fact. . . by a preponderance of evidence." Huddleston v. United States, ___ U.S. ___,

108 S.Ct. 1496, 1501 (1988). This argument, however, is artificial and incorrect. Citing United States v. Kramer, supra, this Court stated in Ashe:

> "'[it] is much too late to suggest that this principle [collateral estoppel] is not fully applicable to a former judgment in a criminal case, . . . because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain.' United States v. Kramer, 289 F.2d 909, 913." Id. at 443.

The existence of a lower threshold standard for the admission of evidence under Rule 404(b) only aggravates the double jeopardy problem. Not only must the defendant run the gantlet a second time, he must do so in a forum in which he runs an appreciable risk of being incarcerated on a quality and quantity of evidence that would normally be insufficient to convict

him.

A rule of evidence cannot override a constitutional provision such as the Double Jeopardy Clause cf. Sutherland Statutory Construction, §2.03 [4th ed.]. Indeed, Rule 404(b) does not, and was not intended to, deal with the question presented in the instant case. Nor is there anything in the Double Jeopardy Clause of the Fifth Amendment which authorizes the de facto retrial of a defendant in a subsequent prosecution for a crime of which he has been previously acquitted regardless of modern rules of evidence unknown at the time of the adoption of the Bill of Rights.

The fact that Rule 404(b) permits the admission of evidence, does not, under the Federal Rules of Evidence, end the inquiry as to its admissibility. It may be barred by other rules of evidence or doctrines

such as collateral estoppel. Indeed, this Court could easily hold that Rule 403 always precludes the introduction of evidence of acquitted conduct because of the confusion and prejudice to a defendant which always exists when the government asks a jury to conclude that a defendant is guilty of an offense of which he has previously been acquitted.

Finally, the conservative constructional approach found in Huddleston v. United States, __ U.S. __, 108 S. Ct. 1496 (1988) does not support the argument. In Huddleston, this Court declined to engraft on to Rule 404(b) the requirement of a preliminary judicial ruling that a defendant has committed prior bad acts by a preponderance of evidence. It did so primarily because the Rule itself contained no such requirement. Equally inappropriate would be an effort to

engraft onto Rule 404(b) some implicit authorization or mandate to admit evidence of prior acquitted conduct which would otherwise be barred by double jeopardy or collateral estoppel, when no such mandate is set forth in the Rule.

II

THE THIRD CIRCUIT ERRONEOUSLY FAILED TO APPLY THE CONSTITUTIONAL HARMLESS ERROR STANDARD

The Third Circuit determined that the introduction of the evidence concerning petitioner's prior involvement in an unrelated robbery was erroneous under Rule 404(b). It declined, however, to reverse the conviction because it determined that the error was nonconstitutional in nature and that the error did not have a "high probability" of having prejudiced the petitioner. 855 F.2d at 124. Had it applied the "harmless beyond a reasonable doubt" standard articulated by Chapman v.

California, 386 U.S. 18 (1987), the result would have been the reversal of petitioner's conviction. For, had a constitutional standard been applied, affirmance would have required that the Circuit Court be ". . . satisfied 'beyond a reasonable doubt', that the evidence had no possible effect on the verdict." United States v. Gonzalez-Sanchez, supra at 584. Such satisfaction could not have been achieved given the fact that the Third Circuit was unable to ". . . entirely discount the possibility that there may have been some prejudice to Dowling by the introduction of Henry's testimony. . ." 855 F.2d 124.

As demonstrated above, the error here was of constitutional magnitude because it involved a violation of petitioner's rights under the Fifth Amendment to the United States Constitution. Accordingly,

the determination of the Third Circuit must be reversed.

CONCLUSION

No practitioner of criminal law, whether prosecutor or defense counsel, can fail to appreciate the devastating effect of evidence of prior offenses. The mere suggestion of prior misconduct completely changes the dimensions of the trial. Where an individual has been acquitted of misconduct, it is singularly unfair to make him revisit the prior allegations at the peril of incarceration. To do so demeans the value of a jury verdict and undermines the integrity of the criminal system as a method for resolving some of the most important disputes which we face. And, it is an incentive for the unsuccessful prosecutor to overturn a jury verdict by inventively integrating evidence the first crime into the trial of

a second charge.

In the federal system, as the Court is well aware, almost all defendants are convicted. The number of cases in which the government will be defeated at trial because it is precluded from using evidence of prior acquitted conduct will be insignificant. Given the powerful policy considerations which clearly justify continued strengthening the Double Jeopardy Clause and its application to cases beyond the literal facts of Ashe, the Court should rule in favor of the petitioner in this cause.

Based upon the foregoing authorities, the decision of the Third Circuit should be reversed on the ground that the error which it found was of constitutional dimension and could not be said to have

been harmless beyond a reasonable doubt.

Respectfully submitted,

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April, 1989